BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
TARGET CORPORATION **33 SOUTH 6TH STREET, #CC-1075** **MINNEAPOLIS, MN 55402** **Employer**	**1251879** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Target Corporation (Employer) operates retail stores. The Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Alfred Daniel Sullivan, III, conducted an accident inspection of Employer.

On January 17, 2018, the Division issued two citations asserting violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, alleged a Regulatory violation of section 342, subdivision (a) [late report of serious injury to an employee]. Citation 2, Item 1, alleged a Serious violation of section 3421, subdivision (c) [failure to stack boxes to prevent falling].

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, and the reasonableness of the proposed penalties. Employer also asserted a series of affirmative defenses for each citation.

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the Board, in West Covina, California. Fred Walter, Partner at Walter & Prince, LLP,[2] represented Employer. Martha Casillas, Staff Counsel, represented the Division. At the hearing, the parties agreed to settle Citation 2, Item 1, leaving only the appeal related to Citation 1, Item 1.

On April 29, 2020, the ALJ issued a Decision affirming a violation of Citation 1, Item 1 and assessed a penalty of $3,750. Employer filed a timely Petition for Reconsideration of the ALJ's Decision. The Board granted reconsideration and took the matter under submission.

In making this Decision After Reconsideration, the Board engaged in an independent review of the entire record. The Board considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

[1] Unless otherwise specified, references are to California Code of Regulations, title 8.
[2] Subsequently, the Board received notice that Mr. Walter joined Conn Maciel Carey LLP.

ISSUES

1. Did the Division establish a violation of California Code of Regulations, title 8, section 342, subdivision (a)?

FINDINGS OF FACT

1. An employee of Employer, Celerino San Luis (San Luis), suffered a head injury while at Employer's store.
2. San Luis was taken to Methodist hospital where he was admitted to the Emergency Room (ER) on July 20, 2017 after 9 AM.
3. While in the ER, San Luis received a CT[3] scan, had an intravenous line inserted, received 4mg of morphine, received other medications, and had his head laceration treated.
4. San Luis was subsequently admitted to the hospital as an inpatient. This transfer took place near noon on July 20, 2017.
5. After admission to the hospital, the following occurred, without limitation: the employee was ordered and received a continuance of several of his preexisting prescriptions; saline flushes of the employee's intravenous line occurred; leg compression devices were placed on the employee for a short period of time; and a further CT scan occurred.
6. The employee was discharged from the hospital on July 21, 2017 at approximately 7:15 PM.
7. Inpatient hospitalization occurred for a period in excess of 24 hours for other than medical observation.
8. Employer did not report this incident to the Division until July 28, 2017, approximately eight days later.

ANALYSIS

1. Did the Division establish a violation of California Code of Regulations, title 8, section 342, subdivision (a)?

Citation 1, Item 1, asserts a Regulatory violation of section 342, subdivision (a). During the relevant time period, that section provided:

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time

[3] Computed tomography (CT).

> frame for the report may be made no longer than 24 hours after the incident.
>
> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Section 330, subdivision (h), during the relevant time period, stated:

> "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to July 20, 2017, the employer did not report a serious employee injury to the nearest District Office of the Division of Occupational Safety and Health in a timely manner.

The Division holds the burden of proving this violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Here, the predominant issue raised by the Employer's petition for reconsideration is whether the Division established a "serious injury or illness" occurred.

A "serious injury or illness" was defined, during the cited time period, as "any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation…" (§ 330, subd. (h).) The Division may demonstrate the existence of a serious injury or illness by showing following elements, without limitation: (1) an injury or illness occurred in a place of employment or in connection with a place of employment; (2) the injury required inpatient hospitalization in excess of 24 hours; and (3) the hospitalization occurred for other than medical observation.

Here, there is very little dispute as to the first and second elements, nor could there be. As to the first element, i.e. an injury occurring in a place of employment, it is undisputed that San Luis, an employee of Employer, suffered a head injury while at work.

The second element, whether there was inpatient hospitalization for more than 24 hours, is also not genuinely at issue. As to this element, the parties dispute whether the calculation of the 24 hour period of inpatient hospitalization should include time spent in the ER. Employer's witness, Dr. Mark Langdorf, M.D. testified that ER treatment is outpatient care. However, the

inclusion of ER treatment is not dispositive as to whether inpatient hospitalization occurred in excess of 24 hours. San Luis was admitted to the Emergency Room (ER) on July 20, 2017 after 9 AM. Dr. Langdorf testified that San Luis was subsequently admitted to the hospital under the care of the admitting doctor, Dr. Sherry Xie, M.D., on July 20, 2017 between approximately 11 and 11:30 AM; and the medical records substantiate that the transfer occurred sometime near the noon hour. Employer's petition acknowledges the transfer occurred "sometime after noon." (Petition, p. 5.) San Luis was not discharged from the hospital until July 21, 2017 at approximately 7:15 PM. Here, even if we exclude consideration of the ER treatment, the aforementioned dates and times demonstrate that inpatient hospitalization occurred in excess of 24 hours. Indeed, Employer's Petition for Reconsideration notes, "The issue presented here is not how long he was an inpatient…" (Petition, p. 2.)

The primary dispute concerns the third element, whether the inpatient hospitalization was for other than medical observation. As to this element, Employer argues the time spent in the ER, and the care and treatment received there, must be excluded from consideration as to whether the inpatient hospitalization was for other than medical observation. Again, Dr. Langdorf testified that ER treatment constitutes outpatient care. Employer next contends that after San Luis was admitted to the hospital as an inpatient, he was only observed. Employer argues no treatment occurred. However, while the occurrence of treatment is undoubtedly relevant, it is not the dispositive regulatory inquiry. The regulatory inquiry is whether there was "inpatient hospitalization for a period in excess of 24 hours for other than medical observation…" (§ 330, subd. (h).)

To determine whether inpatient hospitalization occurred for other than medical observation, the meaning of the term "medical observation" must be first ascertained. Since that term is not specifically defined, we apply common or ordinary definition to the words, which may be derived from dictionaries. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal. App. 4th 75, 82-83 [other citations omitted].) The word "observe" is defined to mean, relevant here, "to watch carefully especially with attention to details or behavior for the purpose of arriving at a judgment*"* or "to make a scientific observation on or of."[4] An "observation" is defined to mean, relevant here, "an act of recognizing and noting a fact or occurrence often involving measurement with instruments" or "a judgment on or inference…from what one has observed."[5] For something to constitute "other than medical observation," it must not fit within the foregoing definitions; it must be other than. [6]

After a careful review of the record, and with the foregoing definitions in mind, we conclude the record amply demonstrates inpatient hospitalization occurred for other than medical observation even excluding consideration of ER treatment.

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[4] Merriam-Webster Dictionary (Online) <www.merriam-webster.com/ dictionary/ observe> [accessed June 25, 2021].

[5] Merriam-Webster Dictionary (Online) <www.merriam-webster.com/ dictionary/ observation> [accessed June 25, 2021].

[6] Even assuming other definitions of the word observation may be located, when there is more than one possible interpretation of a safety order or more than one definition, our directive is to adopt an interpretation that is most protective of workers. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 310-314; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 100-101, 106-107)

From approximately the noon hour on July 20, 2017 until approximately 7:15 p.m. on July 21, 2017, the employee was admitted to the hospital as an inpatient. During this time period, while certain activities such as the occurrence of a CT scan and placement of a heart monitor might have constituted medical observation, others did not. During the inpatient hospitalization, San Luis received a continuance of several of his pre-established prescriptions; several saline flushes of the employee's intravenous line occurred to ensure the continued viability of the line and vein; and leg compression devices were placed on the employee for a short period of time to prevent formation of blood clots. We conclude that these activities, whether considered individually or in aggregate, were for "other than medical observation." Even Dr. Langdorf opined that the saline flushes and compression devices could not be considered mere observation; therefore, these were "other than."

Finally, the evidence demonstrates that Employer did not report the injury until July 28, 2017, long after expiration of the regulatory reporting period. (§ 342, subd. (a).) Employer was aware that San Luis was taken to the hospital. We conclude that with a diligent inquiry Employer could have known of the serious injury or illness at an earlier time. "[A] citation for failure to report a serious injury may be upheld where the Board finds that the Employer knew of the serious injury, or should have known of the serious injury had it engaged in a diligent inquiry." (*Burbank Recycling*, Cal/OSHA App. 10-0562, Decision After Reconsideration (June 30, 2014).) Further, even assuming, arguendo any doubt existed on this point, the Board has long held that doubts must be resolved in favor of a report. (*Ibid.*)

Consequently, we conclude that the Division established that a serious injury or illness occurred and the evidence demonstrates that the Employer failed to report it in a timely manner.

DECISION

For the reasons stated above, we affirm the Citation 1, Item 1, and assess the penalty found by the ALJ.

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 07/22/21